

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

_____ ELOUISE PEPION COBELL, et al.,)	
)	
Plaintiffs,)	
)	
v.)	Case No. 1:96CV01285
)	(Judge Robertson)
DIRK KEMPTHORNE, Secretary of the Interior, et al.,)	
)	
Defendants.)	
_____)	

**DEFENDANTS' OPPOSITION TO PLAINTIFFS'
MOTION IN LIMINE TO PRECLUDE TESTIMONY, DOCUMENTS,
AND OTHER INFORMATION REGARDING NORC'S META-ANALYSIS**

Defendants respectfully oppose Plaintiffs' Motion in Limine to Preclude Testimony, Documents, and Other Information Regarding NORC's Meta-Analysis (Dkt. No. 3402) (filed Sept. 20, 2007) ("Plaintiffs' Motion" or "Pl. Mot.").¹ On its face, Plaintiffs' Motion is primarily an attack on the quality of work performed by the Department of the Interior ("Interior") and its statistical contractor, the National Opinion Research Center ("NORC"), in the period since the filing of Interior's 2003 Plan with this Court. The first sentence of their motion sets the tone: "Since publication of the January 6, 2003 accounting plan, defendants have undertaken no historical accounting activities for the pre-1985 time period, with one notable exception – NORC's Meta-Analysis." Pl. Mot. at 1. Plaintiffs proceed to attack defendants for "divert[ing] their resources," *id.*, assert that "defendants did nothing to account for transactions and assets in the pre-1985 time period," *id.* at 3, and characterize the meta-analysis work as being "equally

¹ In accordance with the Court's directive, Defendants are filing this response on an expedited basis. *See* Tr. 70:1-7 (May 14, 2007).

unbelievable and fantastic,” id. Plaintiffs further advise the Court that they “strongly dispute the findings of the Meta-Analysis as well as the methodology employed by defendants,” id. at 4, recite their own proffered expert’s opinions that the NORC’s report “is misrepresentative, misleading, starkly inconsistent with the underlying studies and ultimately irrelevant,” id., and conclude by first asserting that they “will not debate the merits of Meta-Analysis as junk science” and then proceeding to advise the Court that “defendants, directly or indirectly, rely solely upon the Meta-Analysis for the unbelievable hypothesis that the pre-1985 time period ‘will yield similar results as those found to date,’” id. at 6-7.

Plaintiffs’ characterization of the role of meta-analysis in Interior’s 2007 Plan is completely in error, and their attacks on NORC’s work are both unsubstantiated and inaccurate. Most notably, as the quoted materials in the above introductory paragraph demonstrate, Plaintiffs continue to grossly overstate the significance of the meta-analysis work undertaken by NORC. In so doing, they ignore the contrary statements in the responsive reports of both Dr. Fritz Scheuren and Dr. Susan Hinkins. E.g., Scheuren Responsive Report at 1 (“Mr. Duncan’s claim that the [Qualitative Meta-Analysis] will play a central role in the 2007 Plan is false and unfounded. In point of fact, the NORC Qualitative Meta-Analysis was conducted primarily for planning and hypothesis setting purpose.”); Hinkins Responsive Report at 4 (“Mr. Duncan has misunderstood the purpose and use of the Qualitative Meta-Analysis Report. It is not central to NORC’s sample design or estimation for the Paper Ledger Era, and to my knowledge, it is not central to the 2007 Plan.”). Plaintiffs’ repetition of their false assertion does not eventually render it a fact; Plaintiffs are simply wrong about the role of meta-analysis for purposes of the 2007 Plan.

Plaintiffs' attacks reveal that the motion in limine is, in reality, a thinly veiled attempt to impeach NORC's work before the upcoming hearing has begun. For the sake of brevity, however, Defendants will limit their response to the one issue that properly could belong within this motion in limine, i.e., Defendants' alleged failure to provide "data or other information considered" by Drs. Scheuren and Hinkins in forming the opinions in their reports.

I. Neither Rule 26(a)(2) Nor This Court Mandated Broad Disclosure of All Materials Considered by Drs. Scheuren and Hinkins During Their Years of Work as Interior's Statistical Consultants

Plaintiffs' Motion is erroneously premised on the conclusion that Rule 26(a)(2) of the Federal Rules of Civil Procedure, Fed. R. Civ. P. 26(a), effectively mandates the disclosure of everything considered by Drs. Scheuren and Hinkins during the years of NORC's retention by Interior. As their reports confirm, Drs. Scheuren and Hinkins have been engaged as statistical consultants for Interior for many years. E.g., Report of Dr. Scheuren at 1 (Dr. Scheuren's involvement dates back to August 2001); Responsive Report of Dr. Hinkins at 4 (she and Dr. Scheuren have been co-leaders for NORC's Interior contract since September 2002). During the five-plus years of their involvement, Drs. Scheuren and Hinkins undeniably have reviewed and considered a vast array of data and materials beyond those identified in their reports. Rule 26(a)(2) does not require that their reports be accompanied by five-plus years worth of data and information, however.

The disclosure requirements under Rule 26(a)(2) are limited to persons who are "retained or specially employed to provide expert testimony in the case or whose duties as an employee of the party regularly involve giving expert testimony." Id. Neither Dr. Scheuren nor Dr. Hinkins was retained or specially employed to testify in this matter; they were employed years ago to

provide expertise in formulating and executing Interior's historical accounting plans.² As such, the bulk of their testimony will be factual in nature, i.e., discussing what NORC did as Interior's consultant and describing what NORC recommended to Interior. To the extent expert opinions are to be offered, they are in response to Plaintiffs' recent challenges to the 2007 Plan, and those opinions have been supported by the data and other information specifically considered by Drs. Scheuren and Hinkins in forming the opinions stated in their expert reports.

During the July 9, 2007, status conference, this Court recognized the potential problem of requiring massive amounts of disclosure in the context of expert reports:

The parties agree that as to expert witnesses Rule 26(a)(2) will be in effect, and they are to exchange Rule [26(a)(2)] disclosures for their expert witness together with data, documents or other information considered by the expert now. That last provision is a little unusual. I mean if there are experts who have considered all of the documents in the Commerce Department or all of the accounting treatises on record, they certainly do not have to produce that kind of information. But if there [are] specific reports or documents that are relevant to their testimony, then they have to be produced along with the 26(a)(2) disclosures.

Tr. 6:18-7:5 (July 9, 2007) (emphasis added).³

Consistent with the Court's direction and the requirements of Rule 26(a)(2), Drs. Scheuren and Hinkins identified – and Defendants have produced⁴ – the materials that they

² Drs. Scheuren and Hinkins are not Interior employees and, as their reports confirm, they have not testified within the past four years. Accordingly, they are not individuals “whose duties as an employee of the party regularly involve giving expert testimony.” Fed. R. Civ. P. 26(a)(2).

³ Plaintiffs' reliance upon Defendants' responses with regard to discovery requests 13, 14, and 15, Pl. Mot. at 4-5, disregards the fact that this Court ultimately considered Plaintiffs' requests and issued its own ruling about the production requirements for experts.

⁴ Defendants have not produced publicly available materials, such as the audit sampling treatise cited by both Plaintiffs' statistical consultant, Mr. Duncan, and Dr. Hinkins.

specifically considered in preparing their expert reports. In particular, with respect to the meta-analysis, Dr. Scheuren confirmed that he relied on NORC's Qualitative Meta-Analysis summary report, not the individual reports analyzed in the summary. E.g., Scheuren Report at 23, Scheuren Responsive Report at 1 n.1. They have not produced the entirety of NORC's materials compiled since August 2001, nor did this Court require that they do so.

It bears noting that Plaintiffs' complaints regarding the production of materials for Drs. Scheuren and Hinkins are wholly at odds with Plaintiffs' conduct with regard to their own proffered expert, Mr. Fasold. According to Plaintiffs' Motion in Limine to Preclude Testimony, Documents, and Other Information Regarding Throughput (Dkt. No. 3401) (filed Sept. 19, 2007), Mr. Fasold is being offered to testify regarding a variety of quantifications with respect to "throughput."⁵ Pl. Mot. in Limine at 1. Nevertheless, despite Defendants' requests, going back to January 2003, Plaintiffs have never produced any documentation to support any of the quantifications in Mr. Fasold's report, nor have they produced any documentation related to any of the experts upon whose opinions Mr. Fasold expressly admitted that he relied. For example, Mr. Fasold's most recent report states that "the Nominal Dollar value of revenue derived from the sale or lease of IIM trust assets is \$13.3 billion," Fasold Report at 2 (Aug. 17, 2007), but Plaintiffs have never produced any documentation or other information showing the process for Mr. Fasold's quantification of revenues, either in 2003 or now, in connection with Mr. Fasold's 2007 report.

See Duncan Report at 22 (referring to "Guy Text"); Hinkins Responsive Report at 38 (same).

⁵ Although Plaintiffs have identified Mr. Fasold as their throughput expert, Mr. Fasold's expert report never uses the word "throughput."

If Plaintiffs truly understood that this Court required Drs. Scheuren and Hinkins to produce materials compiled over the years of their work for Interior, then they surely would have produced comparable materials for Mr. Fasold.⁶ Plaintiffs' failure to produce the data and other information considered by Mr. Fasold confirms, at the very least, that they understood the production requirements to pertain only to documents and other information regarding the current reports prepared by the experts.

CONCLUSION

For the foregoing reasons, Defendants respectfully request that this Court deny Plaintiffs' Motion in Limine to Preclude Testimony, Documents, and Other Information Regarding NORC's Meta-Analysis .

Dated: September 25, 2007

Respectfully submitted,
PETER D. KEISLER
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J. CHRISTOPHER KOHN
Director

⁶ The requirements are even clearer for Mr. Fasold's report because he is, undeniably, an expert retained to provide opinions for this litigation, and as such, clearly falls under the requirements of Rule 26(a)(2).

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CERTIFICATE OF SERVICE

I hereby certify that, on September 25, 2007 the foregoing *Defendants' Opposition to Plaintiffs' Motion In Limine to Preclude Testimony, Documents, and Other Information Regarding NORC's Meta-Analysis* was served by Electronic Case Filing, and on the following who is not registered for Electronic Case Filing, by facsimile:

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Kevin P. Kingston

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DIRK KEMPTHORNE,)	
Secretary of the Interior, <u>et al.</u> ,)	
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ORDER

This matter comes before the Court on *Plaintiffs' Motion In Limine to Preclude Testimony, Documents, and Other Information Regarding NORC's Meta-Analysis* [Dkt. No. 3402]. Upon consideration of the Plaintiffs' Motion, Defendants' Opposition, and the entire record of this case, it is hereby

ORDERED that said Motion In Limine is DENIED.

SO ORDERED.

United States District Judge

Date:_____